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BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554

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**In the Matter of:**

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| **Reexamination of the Comparative Standards for New Noncommercial Educational Applicants** | ) ) ) | **MM Docket 95-31** |

**TO: The Commission**



## REPLY COMMENTS OF SOUTHWEST FLORIDA COMMUNITY RADIO, INC. SIDE BY SIDE, INC., CHRISTIAN BROADCASTING ACADEMY, LIVING FAITH FELLOWSHIP EDUCATIONAL MINISTRIES, ILLINOIS BIBLE INSTITUTE, AND RADIO TRAINING NETWORK

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## REPLY COMMENTS

Southwest Florida Community Radio, Inc., Side By Side, Inc., Christian Broadcasting Academy, Living Faith Fellowship Educational Ministries, the Illinois Bible Institute, and the Radio Training Network (Joint Commentors) file these Reply Comments. Comments were filed by Joint Commentors and by Jimmy Swaggart Ministries, Inc.; The Association of America's Public Television Stations and National Public Radio (APTS/NPR); Montgomery Christian Educational Radio, Inc.; Moody Bible Institute; Arizona Board of Regents, *et. al.*; American Family Radio, Inc.; Tony Bono (KSBJ); Mark Norman (KCCU-FM); and the National Federation of Community Broadcasters (NFCB).

The NFCB has abandoned its proposed point system and none of the comments filed support a point system with two exceptions.[1] These Reply Comments, therefore, will focus on several of the comparative criteria suggested in one or more of the Comments filed.

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[1] The Moody Bible Institute proposes a specific 12-point preference system. Montgomery Christian Educational Radio, Inc. also supports a general point system.

**1. Representative Governing Board.**

APTS/NPR claims that a governing board that is representative of the community should receive a comparative credit. This factor would not only be difficult to evaluate comparatively, but it is also a criteria with no demonstrative nexus to provision of more responsive programming. Giving credit to a "representative governing board" suffers from some of the same infirmities noted by the Court of Appeals in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) (*Bechtel II*) in awarding integration credit. The Court's admonition against regulatory agency promotion of an ownership or management structure which would not otherwise be adopted is equally applicable here. The Court noted,

> One should still be skeptical when regulatory agencies promote organizational forms that private enterprise would not otherwise adopt. At least such skepticism is appropriate when the agencies are trying to accomplish something that is essential to the survival and prosperity of firms in an ordinary market -- such as insuring that a business identifies and fills available market niches, is responsive to its customers, and complies with laws whose violation can get its owners into serious trouble and jeopardize the value of their investment.

*Id.* at 881. Noncommercial broadcasters are impacted by the same types of concerns identified by the Court. They must air programming that is responsive in order to raise necessary funding. The Commission has expressly distanced itself from claiming any expertise in business management which would include the structure of an applicant. The Commission has denied having any "particular expertise in finance or business management" and is "reluctant to second-guess an applicants business judgement -- so long as it is, in fact, a good faith business decision." *Victory Media, Inc.*, 3 FCC Rec. 2073, 2075, ¶19 (1988); *See also, Omaha TV 15, Inc.* 4 FCC Rec. 730, 732-733, ¶20 (1988) ("There is difficulty in having the FCC define what constitutes 'good' management. The Commission is reluctant to impose on applicants any one view of what constitutes

a well managed broadcast venture"). Giving credit for a so-called "representative governing Board" is just the type of hands-on governmental manipulation of business structure and management that the Court and the Commission have noted is not appropriate.

Any comparison of governing boards would also be difficult and lead to the type of litigation which all parties are attempting to avoid. Is a 15-member board necessarily more representative than a 3-member board? If so, is a 25-member board more responsive and representative than a 15-member board? Also, what type of representation is more significant? Should the representation be racial? occupational? or ethnic? In a close case, which type of representation should be given more weight -- racial or occupational?

If credit is awarded for representative governing boards, it would not be long before applicants would be forced to "fit the mold" and, in the long run, this would disserve the public interest. Again, as noted by the Court in *Bechtel II*, "[A]pplicants would immediately start to adopt the specified ingredients solely to satisfy the Commission, and would feign them, so that their earlier predicted value would decline." *Id.* at 7. Furthermore, Board composition could easily be changed after award of the construction permit. Although, APTS/NPR suggest this problem can be addressed by ensuring that an applicant's Articles of Incorporation require its Board to remain representative of the community, Articles can also easily be amended.

The most troublesome idea concerning Boards is the suggestion that, "the Commission should give credit to state agencies and entities that are created to provide educational and public broadcast programming to the state." APTS/NPR Comments at 9. This amounts to giving a preference to a state voice. Government should not be preferred over its citizens. Why should the

state's viewpoint be given a preference over that of its citizens? This suggested enhancement is not only unjustified, but it is constitutionally infirm.

**2. Integration into the Community.**

APTS/NPR also suggests that comparative credit should be awarded if an "applicant is integrated into the educational, cultural, social, and civic organizations and institutions in the community." Comments p. 10. The same concerns raised with respect to representative governing boards are also applicable here. If two of three Board members are "integrated into the community", should that applicant be given more credit than an applicant that has four members integrated but has a total Board membership of ten? This type of criteria is not only difficult to quantify but is likely to result in a great deal of litigation as applicants attempt to assess whether a Board member really is associated with an organization and, if so, whether an association was full time or part time, or whether an association with the symphony orchestra should be preferred over an association with the local hospital. This is precisely the type of litigation over minutia that the Commission acknowledges made its commercial comparative proceeding unworkable. *See, Notice of Proposed Rulemaking,* 7 FCC Rec. 2664, 2665, ¶ 9 (1992) ("Comparative hearings often appear to become bogged down in litigating subjective or trivial distinctions"). More importantly, there is no empirical evidence to support the contention that such integration results in better programming. A non-integrated Board, for example, could be far more knowledgeable than a so-called integrated Board by conducting objective market research.

**3. Ascertainment of Community Needs.**

APTS/NPR's proposal that ascertainment play a significant role is a throwback to the pre-deregulatory era. It proposes that "an applicant that has conducted an ascertainment of community

needs and has in place reasonable procedures for assuring continued ascertainment of community needs should receive credit." Comments at 11. A caveat is mentioned that the ascertainment need not comply with any formal ascertainment or stringent ascertainment rules. However, if ascertainment becomes a comparative factor, then the applicant who conducts a more thorough ascertainment of needs, or has in place better procedures for ensuring the continued ascertainment of community needs, would purportedly receive an enhanced credit. This would propel applicants into attempting to outdo each other in an effort to gain a leg up on the competition. Applicants would soon be conducting full-blown ascertainments -- a time-consuming, expensive, and burdensome procedure that the FCC has specifically rejected. *See, Revision of Program Policies and Reporting Requirements Related to Public Broadcast Licenses*, 98 FCC2d 746, at ¶16 (1984)("We conclude the ascertainment requirements are unwarranted, particularly in view of the substantial cost they impose"). In rejecting ascertainment, the Commission noted that ascertainments "unnecessarily place the emphasis on the methodology used to determine community needs rather than on the key issue of the station's responsiveness to these needs. Instead of focusing on these formalistic requirements, we believe licensees should be afforded wide discretion to determine how community needs should be ascertained and met." Any suggestion that ascertainment become part of a noncommercial comparative analysis should be rejected for the same reason ascertainment was rejected over 10 years ago. The Commission's conclusion then is equally applicable now.

> In light of their not insubstantial cost, misplaced emphasis, doubtful necessity, and our judgement that the various social and market forces referred to above will combine to provide the necessary assurance that public stations will operate in the public interest, ascertainment obligations will no longer be applied to public stations.

*Id.* at ¶22.

With the greatly increased number of radio and television stations available now as compared to even 10 years ago, and the ongoing obligation of these stations to serve the public interest, there is far less of a need to conduct ascertainments than there ever was. A broadcaster should have the discretion to air the type of programming it feels is needed in the community. The economics of broadcasting will go a long way toward ensuring responsive programming because, absent the need for the programming, there will be no financial support. As noted by the Commission,

> No detailed consideration of the system's financial structure is necessary to recognize that all public stations have a substantial interest in presenting programming that will encourage continued and increased financial support by their varied sponsors.... In this respect the relationship between the audience and the local public broadcaster is even more direct than in the case of commercial broadcasting because public broadcasting subscribers pay directly for programming that meets their needs and interests. Failure to discover and respond to audience needs and desires would lead inevitably to a reduction in such contributions.

*Id.* at ¶¶18 and 19.

Even more troubling is APTS/NPR's suggestion that the FCC pass judgment on the programming offered by an applicant. They note, "Clearly, creative news and public affairs program [sic] should be given substantial credit in any comparative analysis." Comments at 11. Why should creative news be given any more credit than religious programming? This type of analysis would result in a preference based on program content, which the FCC has carefully and properly avoided. As noted in *Bechtel II, supra* at 886, "Yet common sense, not to mention the First Amendment, counsel against the Commissions trying to decide what America should see and hear over the airwaves." The Commission has also noted, "Moreover, as a general proposition, we believe that the Commission should regulate only where social and market forces are unlikely to ensure service in the public interest. The First Amendment makes it all the more important to rely on these forces

as much as possible when program regulation is at issue." *Revision of Program Policies, supra* at ¶17.

**4. Ability to Effectuate Proposal.**

APTS/NPR proposes a criteria that would examine the likelihood of an applicant building and successfully operating the proposed station. Although there is merit to the concept, the specific criteria proposed to evaluate the likelihood of building a station are unworkable. Specifically, APTS/NPR proposes to examine "whether the applicant has demonstrated financial resources *beyond* the mere showing necessary to establish its financial qualifications; whether the applicant has a realistic business plan; whether the applicant has a past record of providing broadcast service; whether the applicant historically has engaged in activities in the community; and such other factors as may be relevant ...." Comments at 12.

The first criteria, whether an applicant has financial resources *beyond* those necessary to be financially qualified, in essence, would award preferences to the "rich" applicants. An applicant is either financially qualified or not. In determining that an applicant is financially qualified, the FCC has made an assessment that sufficient resources are available. This should be enough.

Joint Commentors do agree that all applicants should be financially qualified. But this should be a qualifying factor, not a comparative factor. As proposed by Joint Commentors, in instances where applicants have six or more pending applications, these applicants should be required to affirmatively demonstrate the financial wherewithal to construct and operate all of the proposed stations.[2]

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[2] Pending applications would not include applications for translator and low power stations.

Review of business plans would involve the FCC in the minutia of broadcast operations and would needlessly consume the FCC's limited resources. Applicants would be required to spend their limited resources arguing the respective merits of different business plans. As noted above, the FCC has been rightly reluctant to get involved in the business aspects of broadcasting operation. *See supra.* at pp. 2 and 3.

There is no demonstrated nexus between an applicant's historic activities in a city of license and the likelihood that it would construct and operate a successful noncommercial radio station. As noted by the Court in *Bechtel II,* "There comes a time when reliance on unverified predictions begins to look a bit threadbare." *Id.* at 880.

Finally, the cost of analyzing an applicant's past record of broadcast service is not worth the benefit. Any analysis of an applicant's past broadcast record could serve as a platform for extensive litigation as the quality of that service is examined and litigated. The Commission would be required to evaluate past broadcast records which would involve an analysis of programming and business operations, areas the Commission has rightly avoided. Joint Commentors do believe, as noted in their Comments, that the broadcast *experience* of the applicant should be considered. This is a relatively simple matter to assess and there is already an existing body of precedent.

**5. Diversity.**

APTS/ NPR claims there should be no diversification demerit for ownership of multiple media properties and that a comparative preference should be given to an applicant that proposes to bring new and different programming, as opposed to an applicant that merely proposes to duplicate existing program services. It claims, "The Commission should consider the totality of the

programming proposals of the applicants as well as the nature of the programming." Comments pp. 14-15.[3]

As noted in the Comments filed by Joint Commentors, diversification should play a factor in assessing noncommercial applicants. There is little, if any, rational basis for considering other media interests in the commercial context but not in noncommercial proceedings. The same theory that diversification of mass media ownership serves the public interest by promoting diversity of programming and viewpoints is equally applicable to noncommercial broadcasters. The thrust of noncommercial broadcasting may be educational, but there is, as in commercial broadcasting, a benefit in ensuring that the educational voice is as diverse as possible.

It is true, as noted by APTS/NPR, that there are certain efficiencies in the ownership of multiple stations which reduce the overall cost of providing programming. Joint Commentors have taken into account this consideration by proposing that diversification and other media interests would only become an issue if an applicant owns 12 or more other media interests. Joint Commentors proposal strikes a balance between the benefit of a diverse viewpoint on the one hand, and the benefit of group ownership on the other.

The proposal that comparative credit be given for diversity of *program content* is unworkable and would entangle the FCC in making program content value judgments. The FCC has always properly avoided such comparisons and, even if it were to consider programming, it would open a Pandora's Box of litigation.

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[3] It appears also to attempt to carve out an exception for syndicated NPR programming by arguing, "In any event, a proposal that includes some duplicated program services, which are distributed nationally or regionally, should not result in its opponent being preferred under this criterion." Comments at 15.

**6. Finder's Preference.**

Joint Commentors have proposed that a finder's preference should play a role, but only in the case of a tie breaker. American Family Radio, Inc. and Montgomery Christian Educational, Inc. argue that great weight should be given to this factor. In fact, Montgomery Christian Educational Radio, Inc. claims, "This point preference should be the largest amount allocated for any one factor." Comments at 10. Joint Commentors believe both parties overstate the significance of being the first to file. There is some added expense in being the first to locate an available noncommercial channel. However, this burden or expense is no different, and may actually be less, than the expense involved in proposing to allocate a new station in the commercial band.[4] Furthermore, any competing application filed for a noncommercial station (as is true for competitors in the commercial band) rarely propose the same facilities. The applications may be mutually exclusive, but different sites, different cities of license (in the case of noncommercial applicants), etc., are usually proposed. The bottom line is that the expense of filing a competing applicant is nearly the same as for the applicant first on file.

More importantly, a strong preference would be an overwhelming deterrent to any other applicant contemplating filing for the station. This would deprive the public of a choice of applicants and would, perhaps, deprive the public of the best applicant. Such a preference would also result in a "land rush" of applicants attempting to be the first on file.

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[4]An applicant for a commercial facility must first locate an available channel then petition the Commission to add the channel to the table of allotments. The Commission then issues a Notice of Proposed Rule Making and the public can then support, oppose, or propose an alternative allocation. The rule making procedures can be far more time consuming and expensive than procedures for a noncommercial applicant. A noncommercial applicant merely locates an available frequency and files an application. Any application, if found acceptable, is then placed on a cutoff.

## 7. Holding Period.

Almost every commentor agrees that there should be some holding period. Otherwise any comparative preference (other than for diversification or for first to file) would be meaningless without some accountability once the construction permit is granted. Any applicant that prevails because of some engineering preference or other comparative preference should be required to fulfill the commitments made and to construct and operate the station as promised for at least one year. If there is a sale of the station after one year, or a deviation from the operation as proposed, this should be considered as a negative in the evaluation of that applicant in any other noncommercial comparative proceedings. Any deviation from any commitment occurring within 3 years of on-air operations would be a negative factor in any noncommercial comparative proceeding involving the same applicant or principals. If an applicant deviates from a commitment in one proceeding, it is highly likely that the applicant will deviate in another. That likelihood should be taken into consideration in any other noncommercial comparative proceeding.

## 8. Conclusion.

Any comparative criteria adopted by the FCC should be simple and easy to apply. Joint Commentors' proposal -- that broadcast experience, diversification and comparative coverage serve as the main criteria for selecting the prevailing applicant -- meet this test. The first to file and the amount of proposed locally produced programming would only be considered as tie breakers. Any criteria that would require an analysis of a representative governing board, integration of the Board into the community, general program proposals, business plans and especially ascertainments open a litigation Pandora's Box. It would result in litigation of a minutia that the Commission has

attempted to avoid, would result in the voracious consumption of FCC and party resources, and would involve the FCC in program content analysis.[5]

Respectfully submitted,

**SOUTHWEST FLORIDA COMMUNITY RADIO, INC.**
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May 31, 1995

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[5]Several parties have suggested that the Commission conduct paper hearings. Paper hearings will not resolve the problem. These criteria would still require applicants to spend countless hours preparing applications and would require the Commission to spend countless hours in reviewing them. Furthermore, unless there is some mechanism to test the claims made by applicants, paper hearings would be meaningless.

## CERTIFICATE OF SERVICE

I, Anna Signorelli, hereby certify that I have, this 31st day of May 1995 caused to be delivered via postage-prepaid, first-class, U.S. Mail, the foregoing REPLY COMMENTS OF SOUTHWEST FLORIDA COMMUNITY RADIO, INC.; SIDE BY SIDE, INC.; CHRISTIAN BROADCASTING ACADEMY; LIVING FAITH FELLOWSHIP EDUCATIONAL MINISTRIES; ILLINOIS BIBLE INSTITUTE, AND RADIO TRAINING NETWORK to the following:

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Certificate of Service
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